Supreme Court, U.S.
FILED
DEC 20 1994
OFFICE OF THE CLERK

No. 93-1783

In the Supreme Court of the United States

OCTOBER TERM, 1994

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor
Department of Labor
Washington, D.C. 20210

TABLE OF AUTHORITIES

Cases: Page

Albemarle Paper Co. v. *Moody*, 422 U.S. 405 (1975) 2
Carozza v. *United States Steel Corp.*, 727 F.2d 14 (3d Cir. 1984) 10
Director, OWCP v. *Cargill, Inc.*, 718 F.2d 886 (9th Cir. 1983) 17
Director, OWCP v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977) 10
Director, OWCP v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) 17
Director, OWCP v. *Greenwich Collieries*, 114 S. Ct. 2251 (1994) 17-18
Director, OWCP v. *National Van Lines, Inc.*, 613 F.2d 972 (D.C. Cir. 1979), cert. denied, 448 U.S. 907 (1980) 17
Director, OWCP v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110 (4th Cir. 1982) 17
Director, OWCP v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17 (3d Cir. 1982) 15
Far East Conference v. *United States*, 342 U.S. 570 (1952) 16
General Tel. Co. v. *EEOC*, 446 U.S. 318 (1980) 5
Gibas v. *Saginaw Mining Co.*, 748 F.2d 1112 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985) 10
INS v. *Chadha*, 462 U.S. 919 (1983) 12
Ingalls Shipbuilding Div. v. *White*, 681 F.2d 275 (5th Cir. 1982) 12
International Primate Protection League v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72 (1991) 16
Kalaris v. *Donovan*, 697 F.2d 376 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983) 9-10
McCord v. *Benefits Review Bd.*, 514 F.2d 198 (D.C. Cir. 1975) 7
Maine v. *Taylor*, 477 U.S. 131 (1986) 12
Martin v. *OSHRC*, 499 U.S. 144 (1991) 11
Monell v. *Department of Social Serv.*, 436 U.S. 658 (1978) 16

Cases—Continued:

	Page
NLRB v. *E.D.P. Medical Computer Sys., Inc.*, 6 F.3d 951 (2d Cir. 1993)	4
Nacirema Operating Co. v. *Benefits Review Bd.*, 538 F.2d 73 (3d Cir. 1976)	7
Nathanson v. *NLRB*, 344 U.S. 25 (1952)	4
Nevada v. *United States*, 463 U.S. 110 (1983)	7
Newpark Shipbuilding & Repair, Inc. v. *Roundtree*, 723 F.2d 399 (5th Cir.), cert. denied, 469 U.S. 818 (1984)	12
Ohio v. *Helvering*, 292 U.S. 360 (1934)	16
Oil, Chem. & Atomic Workers Int'l Union v. *OSHRC*, 671 F.2d 643 (D.C. Cir.), cert. denied, 459 U.S. 905 (1982)	7
Perry, In re, 882 F.2d 534 (1st Cir. 1989)	11
Ryan-Walsh Stevedoring Co. v. *Trainer*, 601 F.2d 1306 (5th Cir. 1979)	10
Shepard v. *NLRB*, 459 U.S. 344 (1983)	3-4
United States v. *Nixon*, 418 U.S. 683 (1974)	12
Vaca v. *Sipes*, 386 U.S. 171 (1967)	4
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978)	13
Weiss v. *United States*, 114 S. Ct. 752 (1994)	10

Constitution, statutes, regulations and rule:

	Page
U.S. Const. Art. III	2, 3, 4, 6, 12
Administrative Procedure Act, 5 U.S.C. 551 *et seq.*:	
5 U.S.C. 551(2)	17
5 U.S.C. 556(c) (§ 7(c))	18
5 U.S.C. 701(b)(2)	17
5 U.S.C. 702	17
5 U.S.C. 703	18
Black Lung Benefits Act, 30 U.S.C. 932(k)	14, 15
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	2, 3
Employee Retirement Income Security Act, 29 U.S.C. 1001 *et seq.*	3
Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*	3

Statutes, regulations and rule—Continued:

	Page
Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*	1
33 U.S.C. 902(1)	15
33 U.S.C. 902(4)	16
33 U.S.C. 902(6)	15
33 U.S.C. 906	2
33 U.S.C. 907(a)	5
33 U.S.C. 907(b)	5
33 U.S.C. 908	2
33 U.S.C. 908(f) (§ 8(f))	17
33 U.S.C. 908(i)	3, 5, 11
33 U.S.C. 909	2
33 U.S.C. 910	2
33 U.S.C. 915(b)	3
33 U.S.C. 916	3
33 U.S.C. 919(d)	17
33 U.S.C. 921(b)(1)	9
33 U.S.C. 921(b)(2)	9
33 U.S.C. 921(b)(3)	10
33 U.S.C. 921(b)(4) (§ 21(b)(4))	13
33 U.S.C. 921(c) (§ 21(c))	6, 7, 13, 15, 16, 17, 18
33 U.S.C. 921(d)	3, 6
33 U.S.C. 921a (§ 21a)	11, 13
33 U.S.C. 939(a)	13
33 U.S.C. 939(c)(1)	3, 5
33 U.S.C. 941	6
33 U.S.C. 944	6
29 U.S.C. 661	10
42 U.S.C. 1983	16
20 C.F.R.:	
Sections 725.410-725.422	14
Section 725.522	15
Section 801.104	10
Sup. Ct. R. 12.3	17

Miscellaneous:

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972)	2, 9, 14
S. Rep. No. 1125, 92d Cong., 2d Sess. (1972)	9, 13
S. Rep. No. 209, 95th Cong., 1st Sess. (1977)	14
Sec. Order 38-72, 38 Fed. Reg. 90 (1973)	10

In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 93-1783

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, PETITIONER

v.

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

---

1. Respondent's contention that the Director, Office of Workers' Compensation Programs, does not have standing to seek judicial review of an erroneous determination by the Benefits Review Board (Board) of a claims award under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA), is premised on a misconception of the matter as a purely private dispute. See Resp. Br. 6-7, 26, 28, 29. It also rests on the erroneous assertion that because the Director is a "neutral" administrator, she cannot "advocate" for either a claimant or an employer without creating an impermissible conflict of interest. *Id.* at 19, 25-28.

Congress created the federal compensation scheme of the LHWCA to further interests broader than merely those

of the particular employer and employee involved in an individual dispute. The program was enacted to "provide adequate income replacement for disabled workers covered" under the LHWCA, "to mee[t] the needs of the injured employee and his family," and also to ensure "that the employer bears the cost of unsafe conditions," thereby "strengthen[ing] the employer's incentive to provide the fullest measure of on-the-job safety." H.R. Rep. No. 1441, 92d Cong., 2d Sess. 1 (1972). Proper determination of award disputes affects the incentive placed by the Act on employers to enhance on-the-job safety; it also affects the extent to which surviving dependents of deceased workers as well as disabled workers themselves will have to seek financial assistance from other public programs—a result Congress specifically intended to avoid. See Pet. Br. 17-18.[1] Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975) (backpay award decisions under Title VII of 1964 Civil Rights Act must "be measured against the purposes which inform Title VII"; "the reasonably certain prospect of a backpay award" provides "the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices"). Accordingly, under the LHWCA, the Director, who is the person charged with administering and enforcing the Act, has Article III standing to seek judicial review of improper awards to vindicate these public interests entrusted to her responsibility—in-

[1] Accordingly, in contrast to the ordinary situation in purely private disputes, the remedy under the LHWCA is carefully circumscribed by the Act's detailed standards for calculating benefits under the LHWCA. The Act specifies what time periods compensation may cover and establishes formulae for determining the amount of compensation (including minimum and maximum amounts) based on a percentage of weekly wages that varies according to such factors as the degree of disability, the part of the body injured, and in cases of death, the number of dependents. See 33 U.S.C. 906, 908, 909, 910.

terests that neither the employer nor the employee may have the same incentive to protect.[2]

As we show in our opening brief, the Director also has legally cognizable interests in the propriety and sufficiency of an award under the LHWCA because of the many specific duties imposed on her by Congress, see Pet. Br. 15-16, 22-25, including her power to bring actions to enforce compensation awards, 33 U.S.C. 921(d).[3] The Director's standing to protect against injury to her duties under the Act, by challenging erroneous decisions on claims for benefits, cannot be distinguished materially under Article III from other statutory schemes in which government officials seek to protect the public interest and obtain relief that also benefits private individuals. See Pet. Br. 18 (discussing government's authority under Title VII of the Civil Rights Act, the Employee Retirement Income Security Act, and the Fair Labor Standards Act); see also *Shepard*

[2] Congress recognized that in some cases employers and employees might prefer to reach a settlement or to arrange their financial relationship in a different manner that might better serve their individual interests but not the public goals, but it significantly restricted their ability to do so. See 33 U.S.C. 908(i) (employer's liability not discharged unless settlement approved by deputy commissioner or ALJ, and settlement may be approved only if adequate and not procured by duress); 33 U.S.C. 915(b) (prohibiting employees from waiving their rights to compenseation under the LHWCA); 33 U.S.C. 916 (providing that "[n]o assignment, release, or commutation of compensation or benefits due or payable" under the Act, except as provided by the Act, shall be valid).

[3] One of the issues raised by the Director in the court of appeals concerned whether the Board erred in resolving as a matter of law the question whether the claimant made diligent efforts to obtain employment in the circumstances of this case, since the claimant reasonably relied on employer statements about a possible position and cooperated with a vocational counselor. How that question is resolved affects the Director's policies on vocational rehabilitation services and her duty to advise employees' regarding their obligations to seek employment during transition periods and vocational rehabilitation. See 33 U.S.C. 939(c)(1); see also Pet. Br. 19.

v. *NLRB*, 459 U.S. 344, 351-352 (1983); *Vaca* v. *Sipes*, 386 U.S. 171, 182-183 (1967); *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952) (NLRB is creditor within meaning of Bankruptcy Act of company against whom Board has issued backpay order); *NLRB* v. *E.D.P. Medical Computer Sys., Inc.*, 6 F.3d 951 (2d Cir. 1993) (NLRB acts in public interest when it seeks backpay for workers injured by unfair labor practices).

Respondent and its amici attempt to distinguish those statutes by arguing that Congress in those schemes "specifically conferred standing" on a government official (Amici Br. 13) or set forth a "central governmental enforcement mechanism" (Resp. Br. 34). These, however, are statutory, not constitutional, arguments against standing. If, as we maintain, the LHWCA allows the Director to participate in LHWCA adjudications and their judicial review, then the Director has Article III standing to seek a compensation order that will provide the claimant his rightful benefits, just as government officials have Article III standing under numerous other statutes to vindicate the public interest by obtaining relief that benefits private individuals.

Respondent contends (Br. 25-27, 28) that the Director is a "neutral" administrator. To the extent respondent means that the Director argues in favor of an accurate award under the Act regardless of who stands to benefit from any necessary correction, we agree. To the extent, however, respondent argues that the Director therefore cannot "advocate" for the position advanced by either claimants or employers (Resp. Br. 19, 25-27), we disagree. In any instance where a claimant seeks an accurate, adequate award of the maximum benefits to which he is entitled under the Act, the Director's interests necessarily coincide with those of the claimant. In other instances, when a claimant is seeking an award greater than what he is due under the Act, the Director's interests coincide with the employer's. In either instance, the fact that the employee or employer shares her interest does not mean that

the Director is either biased or no longer protecting the governmental interests conferred by the Act. Cf. *General Tel. Co.* v. *EEOC*, 446 U.S. 318, 326 (1980) (when "EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination").[4] The Director has a material interest in the proper construction and application of the Act, and that interest is engaged each time the Director concludes that the Board has incorrectly adjudicated a particular claim, no matter who stands to benefit from the resolution of the dispute—the affected employee, employer, or insurer.

Respondent also argues (Br. 19, 31-32) that if the Director participates in proceedings where a claim award is being determined, it "may result in the Director taking positions which are in direct conflict with her pecuniary interest in protecting the assets of the Special Fund." Resp. Br. 31. As respondent points out, even in this case, there is a potential to increase the liability of the Special Fund, depending on what degree of disability is

[4] Respondent's assertions that "there is no need for the Director to act as an advocate for claimants" (Br. 29) ignores the fact that by urging an accurate award for the claimant in this case, the Director is espousing her own interests as the official charged with administering and enforcing the Act, which here coincide with those of the claimant. In any event, there is no legal prohibition against the Director's acting as an advocate for or protector of a claimant's interests, inasmuch as Congress determined that in some instances there is a need for her to do so. See, *e.g.*, 33 U.S.C. 939(c)(1) (authorizing Director to provide legal assistance to claimants); 33 U.S.C. 908(i) (authorizing Director to approve settlements only after review to ensure not inadequate and not procured by duress).

Similarly, Congress determined that the Director's interests would sometimes coincide with the employers' interests. See, *e.g.*, 33 U.S.C. 907(b) (Secretary has authority to determine sufficiency of medical care and may on his own, or at request of employer, order a change of physicians or hospitals when desirable, including when the charges (which the employer pays, 33 U.S.C. 907(a)) exceed customary community charges).

determined, what length of time payments are awarded, *ibid.*, and whether respondent becomes insolvent. *Id.* at 32. Respondent reasons that as administrator of the Special Fund, the Director "is obligated to protect its assets," *id.* at 31, and that there is therefore a potential conflict of interest when the Director advocates a position that could increase the financial burden on the Special Fund. *Id.* at 31-32.

Again, respondent misperceives the duties Congress imposed on the Director under the LHWCA. As administrator of the Special Fund, the Director's role is not to resist payment of meritorious claims; to the contrary, her duty is to authorize payment on claims that meet the criteria for Special Fund payment. The fact that an increase of a claimant's award would increase the liability of the Fund does not present a conflict of interest; it is wholly consistent with the duties assigned to the Director under the Act, as long as the award is an accurate determination of what is due the claimant under the Act.[5] Cf.

[5] Respondent concedes that the Director has Article III standing to appeal awards decisions in certain circumstances, *e.g.*, where the award affects the Special Fund or where the decision deals "with her procedural rules for administering Longshore Act claims." See Resp. Br. 28. Respondent also states that the Director "arguably has Article III standing to appeal decisions on the jurisdictional scope of the Longshore Act, since such decisions define her administration." *Ibid.* Likewise, amici acknowledge (Br. 21, 18-19) that the Director "may well incur injury in fact * * * when [] a [Board] order conflicts with her delegated statutory enforcement responsibilities," which amici identify (Br. 19) as: the Secretary's authority to enforce final compensation awards, 33 U.S.C. 921(d); his authority over the Special Fund, 33 U.S.C. 944; and his authority to promulgate and enforce safety rules, 33 U.S.C. 941.

Respondent and amici suggest, however, that the Director does not have statutory standing under 33 U.S.C. 921(c) to protect even those concededly legally cognizable interests against injury because, they assert, the Director is not a "person" within the meaning of 921(c). Resp. Br. 38-39; Amici Br. 19. That contention is contrary to the court of appeals' express holding (Pet. App. 9a, 13a), and, as we show, pp. 15-17, *infra*, is in error.

Nevada v. *United States*, 463 U.S. 110, 127-128 (1983) (noting responsibility of Secretary of the Interior to perform and reconcile competing statutory duties affecting private interests).

2. Respondent and amici repeatedly argue (Resp. Br. 7-9, 25, 28-29, 38; Amici Br. 13-14) that because the purpose underlying the 1972 amendments to the LHWCA was to separate the administrative and adjudicatory functions under the LHWCA, Congress therefore intended to restrict the administrator's right to judicial review. While we agree that a major purpose of the 1972 amendments was to remove the administrator from also serving the role of adjudicator, that rearrangement undermines rather than supports respondent's position that the administrator cannot seek judicial review of the Board's decisions.

A purely adjudicatory entity has no legally cognizable interest in defending its decision on review; hence, a district court does not appear in the court of appeals to defend its decisions. For the same reason, an administrative agency whose role is purely adjudicatory "has no duty or interest in defending its decision on appeal." *Oil, Chem. & Atomic Workers Int'l Union* v. *OSHRC*, 671 F.2d 643, 652 (D.C. Cir.) (per curiam), cert. denied, 459 U.S. 905 (1982). That is one of the reasons courts have declined to accord respondent status to the Benefits Review Board, a purely adjudicatory body, in Section 21(c) review proceedings before the court of appeals. *Nacirema Operating Co.* v. *Benefits Review Bd.*, 538 F.2d 73, 75 (3d Cir. 1976) (Board "performs a review function which prior to the 1972 amendments was performed by the district courts [and like] * * * those courts ha[s] no duty or interest in defending [its] actions on appeal"); *McCord* v. *Benefits Review Bd.*, 514 F.2d 198, 200 (D.C. Cir. 1975) ("[t]o require the Board to appear as a party would parallel requiring the [d]istrict court to appear and defend its [own] decision [on] * * * appeal").

Prior to 1972, the situation under the LHWCA was different. The administrative function was vested in the

same persons as the adjudicatory function—the deputy commissioners. A deputy commissioner was accorded standing to seek court of appeals review of a district court judgment overturning the commissioner's decision on a claim, even in the absence of an appeal by another party. See Pet. Br. 26. (Neither respondent nor amici dispute the deputy commissioners' pre-1972 authority to seek court of appeals review of district court decisions.) This was so because the interest that supported the deputy commissioners' standing to appear before courts and secure judicial review was premised on their policy making, administrative, and enforcement interests, not on their adjudicatory function. When the 1972 amendments separated those functions, the natural inference is that Congress acted on the premise that the administrator, now in the person of the Director, would retain the right to seek federal court of appeals review of claim determinations she believes to be erroneous.

Neither respondent nor amici point to any evidence that the 1972 amendments eliminated the authority of the administrator to seek judicial review. Their argument appears to view any official who participates as a party in an adjudication as exercising some type of "adjudicatory" authority. The adjudicator itself (the Board) is, of course, the only entity serving an adjudicatory function in the proceedings. The participation of the parties (including the Director) does not mean they too are performing an adjudicatory role. Rather, the parties are properly advocating their distinct interests. Respondent claims that Congress "did not intend the administrative function to be involved in the adjudication process." Resp. Br. 8. Yet, the excerpt from the 1972 House Report cited by respondent in support of that proposition merely reveals an intent to keep separate the functions of administering the program and "*sitting in judgment*" at the hearing, *i.e.*, being the adjudicator; it does not indicate an intent to prevent the administrator from participating as a party in the

adjudicatory process. See Resp. Br. 8, quoting H.R. Rep. No. 1441, *supra*, at 11; Amici Br. 6 (same).

In fact, by transferring the administrator's adjudicatory role to ALJs and the Board, the administrator's enforcement role and concomitant interest in securing judicial review of decisions adverse to her position was enhanced, not diminished. The amendments freed the administrator to play a fuller role in the claims process, without interfering with the independent role of the Board. The separation of functions accords the Director greater ability to advocate her administrative interest as a participant in proceedings under the Act. See S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972) ("it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for purposes of the disputes brought under this statute").

3. Respondent contends that the Secretary is impermissibly seeking an "advisory opinion" on the correctness of competing interpretations of the Act by seeking, through one of his delgates (the Director), review of the decision of another of his delegates (the Board). See Resp. Br. 22 n.13, 23-25, 29, 36-38, 39. This argument miscomprehends the nature of the Benefits Review Board.

The Board, insofar as it issues decisions on claims, is not a delegate of the Secretary; that *adjudicatory* duty is assigned by statute directly to the Board itself. See 33 U.S.C. 921(b)(2). In arguing to the contrary, respondent mistakenly relies (Br. 37) on 33 U.S.C. 921(b)(1), which permits the Secretary to delegate to the Board's chairman oversight of "all *administrative* functions" necessary to operate the Board. That provision does not concern delegation of adjudicatory functions, which are statutorily lodged in the Board in the first instance.

Congress clearly intended the Board's adjudicatory function to be exercised independently of the administration of the Act, and it entrusted the Secretary with the obligation to ensure that independence. See H.R. Rep. No. 1441, *supra*, at 11; see also *Kalaris* v. *Donovan*, 697

F.2d 376, 390 & 392 n.64 (D.C. Cir.), cert. denied, 462 U.S. 1119 (1983); *Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632, 649 (6th Cir. 1977) (Board is independent of Secretary "as far as policy and decision making are concerned"). The Secretary has therefore accorded the Board complete independence from both the Director and the Secretary in its decisionmaking. See Sec. Order 38-72, 38 Fed. Reg. 90, 91 (1973) (Secretary's order establishing Board directs Under Secretary of Labor to "promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Board as an independent quasi-judicial body in accordance with the provisions of the statute"); see also 20 C.F.R. 801.104. Indeed, courts have held that the Board has the power to declare the Secretary's regulations to be contrary to law. *Gibas* v. *Saginaw Mining Co.*, 748 F.2d 1112, 1119-1120 (6th Cir. 1984), cert. denied, 471 U.S. 1116 (1985); *Carozza* v. *United States Steel Corp.*, 727 F.2d 74, 77 (3d Cir. 1984). The Board does not, however, have authority to engage in administration of the LHWCA by promulgating rules. See *Ryan-Walsh Stevedoring Co.* v. *Trainer*, 601 F.2d 1306, 1314 n.7 (5th Cir. 1979); 33 U.S.C. 921(b)(3).

To be sure, the Board differs somewhat from other fully independent adjudicatory bodies, such as the Occupational Safety and Health Review Commission (OSHRC), see 29 U.S.C. 661, in that the Board is placed within the Department of Labor and the Secretary has the power to appoint and remove members as well as to exercise other operational control over the Board. *Kalaris*, 697 F.2d at 390-391. Cf. *Weiss* v. *United States*, 114 S. Ct. 752 (1994). Nonetheless, the Secretary plays no part in the Board's determination of an award.[6] Thus, although the

[6] Amici err in chastising (Br. 16 & n.12) the Department for "commingling [administrative and adjudicatory] functions" by permitting "the OWCP and the 'quasi-independent' BRB [to] share the same attorneys and legal advice from the Office of the Solicitor of Labor." In fact, the Board employs its own staff of attorneys, who are in the Board's Office of General Counsel, wholly apart from the Office of the Solicitor of Labor. The Office of the Solicitor represents the Board, in conformity with 33 U.S.C. 921a, only in the rare instances when the Board has been the subject of a mandamus action, and it is the Solicitor's policy to assign those cases to attorneys from the Solicitor's Office who do not represent the Director before the Board.

Board is located within the Department of Labor, it, like OSHRC, deviates "from the conventional agency model in that it is purely an adjudicator; there is no intermixing of regulatory, prosecutorial, and adjudicative functions." *In re Perry*, 882 F.2d 534, 537 (1st Cir. 1989); see also *Martin* v. *OSHRC*, 499 U.S. 144, 151 (1991).

The Board's decisions therefore cannot be considered "unitary" agency decisions, as respondent and amici suggest (Resp. Br. 20; Amici Br. 15), because they are not decisions of the Secretary and do not reflect the Secretary's resolution of the claim. In fact, the bifurcated structure of the administrative scheme established by the LHWCA reinforces the fact that the Secretary and the Board may reach differing positions in light of their different roles. The Secretary "enjoys readily identifiable structural advantages" over the Board in certain respects because he participates in informal resolutions of claims, 33 U.S.C. 908(i), and "comes into contact with a much greater number of regulatory problems than does the [Board], which encounters only those regulatory episodes resulting in contested [claims]." *Martin* v. *OSHRC*, 499 U.S. at 152. Thus, the Secretary, through the Director, is free to seek judicial review of Board decisions when, in his view, the Board incorrectly has resolved a claim.

The Director is clearly not seeking an advisory opinion from the court of appeals, as respondent suggests (Br. 22 n.13, 24). If the Secretary were to prevail on the merits in this case, the victory would have a concrete effect: It would result in entry by an OWCP district director of a new compensation order requiring the employer to pay a

higher level of benefits to his injured employee. The Secretary cannot provide such relief; under the terms of the LHWCA, such relief can come only from the court of appeals once a final Board decision has been entered. Cf. *Maine* v. *Taylor*, 477 U.S. 131, 137 (1986) (a State, as intervenor in federal criminal prosecution, has standing to appeal ruling invalidating state law even though federal prosecutor did not seek further review, because controversy remained live inasmuch as reversal of judgment would result in automatic reinstatement of defendant's conviction); *United States* v. *Nixon*, 418 U.S. 683, 692-697 (1974).[7]

4. Although respondent and its amici do not dispute that the Secretary's regulations specifically identify the Director as a party entitled to assert his interest in the administrative process and seek judicial review, they suggest that those regulations conflict with the Act. Amici Br. 5-11; Resp. Br. 24 n.14. The amici go so far as to contend (Br. 8), without any supporting authority, that the Secretary overstepped his authority by authorizing the Director to appear as a "part[y] in interest" in administrative proceedings. That contention has no merit. See *Ingalls Shipbuilding Div.* v. *White*, 681 F.2d 275, 288 (5th Cir. 1982) (upholding Director's party-in-interest status in administrative proceedings), overruled in part on other grounds, *Newpark Shipbuilding & Repair, Inc.* v. *Roundtree*, 723 F.2d 399 (5ht Cir.), cert. denied, 469 U.S. 818 (1984). The Act expressly authorizes the Secretary to issue rules and regulations for purposes of administering the Act, 33 U.S.C. 939(a), and it is a "very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 544 (1978). That tenet is particularly applicable here, because Congress in 1972 intended "that the Secretary take full advantage of the requirement of separating the functions under this statute to consider a complete reorganization of the * * * administration of th[e] Act" and "to revise the regulations under this Act which ha[d] not been amended for many years." S. Rep. No. 1125, *supra*, at 14.

[7] Respondent errs in suggesting (Br. 7, 20, 22 & n.13, 36-37) that petitioner lacks Article III standing because the sole controversy here is between the Director and the Board, and that the Director's injury is not attributable to respondent. It is respondent that has refused to pay what the Director contends is the appropriate disability benefit for the period in question; thus, there is a controversy between the parties "attributable to the [conduct of the] opposing party (the employer) [as] required for Article III * * * standing." Resp. Br. 20. Compare *INS* v. *Chadha*, 462 U.S. 919, 939-940 (1983).

Amici also argue (Br. 8-9) that 33 U.S.C. 921(b)(4), which permits the Board to remand a case to the ALJ without the consent of "parties in interest," somehow establishes that the Director cannot be a party in interest and therefore precludes her from participating in the administrative process. To the contrary, the most natural reading of that statutory provision is that the Secretary is one of the parties in interest before the Board. The Secretary is expressly accorded the authority to request a remand from the Board in recognition of his special role in protecting the public interest through accurate claim determinations. Indeed, the most natural way for the Secretary to make such a request would be by participating as a party to the administrative proceeding.

The arguments pressed by respondent and amici with regard to the Director's seeking judicial review are unavailing as well. Respondent attempts (Br. 9) to limit the significance of 33 U.S.C. 921a, which allows attorneys appointed by the Secretary to represent him "in any court proceeding[]." Contrary to respondent's contention (Br. 9) that the provision is limited to "enforcement proceeding[s]," the provision by its terms is not so limited, and clearly encompasses Section 21(c) review proceedings in the court of appeals.[8]

[8] The amendment to Section 21a of the Act was described in the legislative history as follows: "Under present law, it is the obliga-

5. Respondent attempts (Br. 35) to downplay the significance of the Black Lung Benefits Act (BLBA), which adopted the pertinent LHWCA procedures. See also Amici Br. 14-15 & n.11. Respondent points out that the BLBA contains a provision that specifies that the Director has party status. 30 U.S.C. 932(k).

We show in our opening brief, however, that the legislative history of the BLBA provision makes clear that at the time Congress enacted that provision, it viewed the Secretary as already having standing under the LHWCA to seek judicial review based on his "interest as the officer charged with the responsibility for carrying forth the intent of Congress with respect to the Act." S. Rep. No. 209, 95th Cong., 1st Sess. 22 (1977). Congress enacted 30 U.S.C. 932(k) to confirm that understanding at the time it brought the BLBA under the same administrative scheme. Neither respondent nor its amici provide sound reasons for rejecting that considered judgment or for treating the black lung scheme differently than the longshore scheme. Both respondent and the amici assert (Resp. Br. 35-36; Amici Br. 15 n.11) that the BLBA is different because in some cases the Black Lung Disability Trust Fund, which the Director administers, is liable on a claim. Many claims under the BLBA, however, do not implicate the Black Lung Disability Trust Fund,[9] and there is no indication

tion of the United States attorney in the district where a case is pending to represent the Secretary or deputy commissioner in cases under the Act. Under the amendment made by this section, attorneys will be appointed by the Secretary to represent the Secretary, the deputy commissioner, a hearing officer, or the Board, except in proceedings in the Supreme Court." H.R. Rep. No. 1441, *supra*, at 21-22.

[9] Respondent states (Br. 36) that in the majority of black lung claims the Black Lung Disability Trust Fund is primarily liable for the claim. This is an overstatement. The Director estimates, for example, that of claims decided during fiscal year 1994 at the district director level, see 20 C.F.R. 725.410-725.422, no more than 30% are claims in which the Director arguably has a financial interest, *i.e.*, are claims in which the Trust Fund is primarily liable or are claims on which, although a responsible operator has been identified, the Trust Fund is paying interim benefits, pending final resolution, based on the district director's initial finding of entitlement. See 20 C.F.R. 725.522.

that 30 U.S.C. 932(k) was intended to apply only to cases implicating the Fund. Indeed, the legislative history of the provision makes clear that a financial stake is not a prerequisite to the Director's standing, and the Director's standing has been upheld under the Act even in the absence of a pecuniary interest. *Director, OWCP* v. *Rochester & Pittsburgh Coal Co.*, 678 F.2d 17, 18 n.2 (3d Cir. 1982). Denying the Director standing under the LHWCA, or limiting her standing to cases in which she has a financial interest, would create unwarranted divergence between LHWCA and BLBA procedures, whereas Congress intended that the procedures for administrative and judicial review under the statutes be the same.

6. Finally, respondent and amici argue (Resp. Br. 20, 23, 38-39; Amici Br. 3, 11-13) that the Director does not have statutory standing under 33 U.S.C. 921(c) as a "person adversely affected or aggrieved," because she is not a "person" within the meaning of the LHWCA. Their argument appears to be that because the statutory definition of "person" (33 U.S.C. 902(1)) does not in terms include "Secretary," and because there also is a statutory definition of "Secretary" (33 U.S.C. 902(6)), the Secretary is necessarily excluded from being considered a person under the Act.

That argument is illogical and inconsistent with the structure of the Act. "Person" is defined for purposes of the Act as an "individual, partnership, corporation, or association." 33 U.S.C. 902(1). "Secretary" is defined to be the Secretary of Labor. 33 U.S.C. 902(6). The mere fact that there is a separate definition to explain who

is referred to by the term "Secretary" does not mean that the Secretary is not an "individual" for purposes of the definition of "person." In fact, if respondent's logic were correct, employers would not have standing under 33 U.S.C. 921(c), because "Employer" is defined separately in 33 U.S.C. 902(4) and the definition of "person" does not specifically include "employer."

It is clear that the Director is an "individual," and hence a "person" entitled to obtain review under 33 U.S.C. 921(c). The term "person" may encompass a governmental official, such as the Director, where the context of the statute so indicates. See generally *Ohio* v. *Helvering*, 292 U.S. 360, 370 (1934) (whether term "person" includes a State or United States depends upon the legislative context in which the word is found); see also *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83 (1991) ("conventional reading of 'person' [as excluding the sovereign] may * * * be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute * * * indicate an intent, by the use of the term, to bring state or nation within the scope of the law' "); *Monell* v. *Department of Social Serv.*, 436 U.S. 658 (1978) (municipal officials are persons under 42 U.S.C. 1983); *Far East Conference* v. *United States*, 342 U.S. 570, 576 (1952) (United States is "person" who may file a complaint under Shipping Act of 1916). The LHWCA's structure and history compel the conclusion that the Director is a "person." Indeed, were this not so, the Director would be powerless to seek review of *any* Board decision, a result that would be inconsistent with the holding of the court below and of every court of appeals that has addressed the question of the Director's standing.

The court of appeals expressly held that the Director is a "person adversely affected or aggrieved" by the Board's ruling on whether respondent was entitled to relief from

the Special Fund under Section 8(f) of the Act, 33 U.S.C. 908(f), and reversed the Board's ruling on that issue. See Pet. App. 9a, 13a (Director is "person * * * aggrieved" by a Board ruling that the Special Fund is liable under Section 8(f)). Thus, contrary to respondent's assertion (Br. 39) that the court of appeals "did not * * * have to reach the issue," the court of appeals' holding necessarily includes a determination that the Director is a "person" within the meaning of the Act—a holding that respondent did not challenge by filing a cross-petition for certiorari under this Court's Rule 12.3.

Moreover, no court has suggested that the Director is without any authority to seek review under 33 U.S.C. 921(c), which would be the necessary consequence of holding that the Director is not a "person" under the Act. Every court that has addressed the issue in the context of a Section 8(f) dispute has accorded the Director standing to seek judicial review. See, *e.g.*, *Director, OWCP* v. *Cargill, Inc.*, 718 F.2d 886, 888 (9th Cir. 1983); *Director, OWCP* v. *Newport News Shipbuilding & Dry Dock Co.*, 676 F.2d 110, 114 (4th Cir. 1982); *Director, OWCP* v. *National Van Lines, Inc.*, 613 F.2d 972, 977 n.6 (D.C. Cir. 1979), cert. denied, 448 U.S 907 (1980); see also *Director, OWCP* v. *General Dynamics Corp.*, 982 F.2d 790 (2d Cir. 1992) (petition for review granted).

Amici (Br. 16-17; 21-22) err in suggesting that the Director's statutory standing is precluded by the Administrative Procedure Act (APA), which, unlike the LHWCA, expressly excludes federal agencies from those "persons" that it authorizes to obtain judicial review of agency action. See 5 U.S.C. 702, 701(b)(2), 551(2). That provision is not applicable to judicial review proceedings under the LHWCA [10] because, according to the APA itself, "[t]he

[10] As we note in our opening brief, the LHWCA specifies that hearings before ALJs shall be conducted in accordance with APA procedures. See 33 U.S.C. 919(d). Although amici cite (Br. 17 n.13) *Director, OWCP* v. *Greenwich Collieries*, 114 S. Ct. 2251

form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute." 5 U.S.C. 703. In the case of Benefits Review Board decisions under the LHWCA, that special statutory review proceeding is the proceeding authorized by Section 21(c) of the LHWCA, 33 U.S.C. 921(c), which must be interpreted according to its own terms and the structure and purposes of the LHWCA as a whole.

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

THOMAS S. WILLIAMSON, JR.
Solicitor of Labor

DECEMBER 1994

(1994), that decision is inapposite. The Court there held that Section 7(c) of the APA, 5 U.S.C. 556(c), placing the burden of proof on a proponent of an order, governs in ALJ hearings because the LHWCA does not indicate that a contrary rule applies.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1994 387147 20025